

69914-8-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KATHIE J. WILLEY, as Personal Representative of the Estate of Ronald
Willey; and KATHIE J. WILLEY, a single individual,

Appellants,

v.

KENNETH REKOW and JANE DOE REKOW, husband and wife and
their marital community; and KARR TUTTLE CAMPBELL, a
Professional Service Corporation,

Respondents.

2013 JUN 29 PM 3:03
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

BRIEF OF RESPONDENTS

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I. INTRODUCTION

On behalf of herself and the Estate of Ronald Willey, Ms. Willey is appealing from a summary judgment order that dismissed her baseless lawsuit against attorney Kenneth Rekow, Jane Doe Rekow, and Karr Tuttle Campbell, the law firm with which Mr. Rekow is associated. Her appeal is fraught with procedural error, including violations of RAP 10.3(5) and (6), and the assertion of new arguments on appeal. Her claims are based on speculation and conjecture, not evidence, both with respect to the acts of Mr. Rekow and her alleged damages. Ms. Willey misapprehends the statute at issue, RCW 11.20.010, and her arguments as to how that statute purportedly applies to this case are contrary to the evidence and all prior interpretations of that provision. And while Ms. Willey now claims that Mr. Rekow breached statutory duties and harmed her and the estate, during the period in question none of the experienced probate attorneys who represented her or the estate claimed that Respondents did anything wrong, let alone that they caused those clients harm.

All of Ms. Willey's causes of action (including the negligence claim that she is addressing for the first time on appeal) are premised on Mr. Rekow's alleged violation of the 30-day delivery requirement of RCW 11.20.010. But that statute provides a remedy only for the *willful* failure to *deliver* a will to a court or named executor, and only to the extent that the *willful* failure proximately caused the damages alleged. Mr.

Rekow timely delivered to Ms. Willey, the named executor of the will in issue, copies of that will – and subsequent estate planning documents that suggested the will might no longer be valid – and informed Ms. Willey that the original documents were in his file. Respondents thus can be found liable to Ms. Willey only if: (1) Mr. Rekow had a duty to deliver the original will rather than a copy; (2) Mr. Rekow *willfully* (not negligently) breached his duty to deliver the original will; and (3) Mr. Rekow’s willful breach, i.e., his delivery of a copy of the will, rather than the original, proximately caused damage to Ms. Willey.

Washington courts have not addressed what constitutes a “delivery” under current probate laws. A delivery clearly does not require a court filing, as RCW 11.20.010 allows delivery to the named executor. And the statute does not expressly require that the delivered document be the original will, not a copy. Nor is there reason to read such a requirement into the statute, particularly when, as here, the holder of the original will met the statutory goal of preventing concealment, informed all concerned of the document’s location, and stood ready to provide the original to anyone who wanted to petition to admit the will to probate.

Unlike “delivery,” Washington courts have frequently addressed what constitutes “willfulness.” Under the definition advanced by Ms. Willey and used by the trial court, one acts willfully if he or she fails “to do an act which one has the duty to do when he or she has actual

knowledge of the peril that will be created and intentionally fails to avert injury or actually intends to cause harm.”¹ Ms. Willey proffered no evidence from which a jury could infer that Mr. Rekow had knowledge that he would create a peril by delivering a copy of the will, rather than the original, let alone evidence from which a reasonable person could find that Mr. Rekow intentionally failed to avert injury or intentionally caused harm to Ms. Willey. The trial court did not err in determining that there is no evidence of willful conduct.

But even were that not the case, summary judgment was appropriately entered because there is no evidence that anything Mr. Rekow did or did not do caused damage to Ms. Willey. Aside from arguments in her briefs, Ms. Willey’s damage submission consists of one paragraph of speculation and conclusory statements. She has failed to rebut evidence establishing that her alleged damages were caused by her own and/or her attorney’s superseding acts, not by anything Mr. Rekow did or did not do. In short, Ms. Willey utterly failed to meet her burden of establishing that she incurred any damages at all, let alone damages proximately caused by Mr. Rekow having delivered a copy of the will instead of the original.

¹ WPI 14.01. *See* RP 18, 25, 27 (Ms. Willey’s advocacy for, and the trial court’s adoption of, this definition of willful).

This lawsuit is baseless and Ms. Willey's appeal is deeply flawed. Mr. Rekow and his fellow Respondents respectfully ask the Court to affirm the trial court and, pursuant to RAP 18.9(a), impose sanctions against Ms. Willey for her multiple procedural violations.

II. RESTATEMENT OF THE ISSUES

1. Should the Court affirm a summary judgment dismissal when all claims asserted are premised on an alleged violation of RCW 11.20.010, and there is no evidence that Respondents willfully failed to make the statutorily required delivery?
2. Should the Court affirm the trial court's summary judgment order on the alternative ground that Ms. Willey failed to proffer any evidence establishing that Respondents' alleged acts or omissions proximately caused her any damage?
3. Given Ms. Willey's procedural violations, should the Court impose RAP 18.9(a) sanctions?

III. RESTATEMENT OF FACTS

Ms. Willey's statement of the "Prior History of the Estate of Ronald Willey" is not only truncated, some assertions are inaccurate, *see, e.g.*, notes 4-5, *infra*; and none are supported by citation to the record. To assist the Court in its review, Respondents provide a Restatement of Facts summarizing the undisputed evidence before the trial court.

A. Mr. Rekow's Estate Planning for Ronald Willey

In 1985, Mr. Rekow drafted wills and other estate-planning documents for Ronald Willey and his then wife, Kathie Willey. CP 52-57; *see* CP 4 ¶ 3.1. Mr. Willey's will (the "1985 Will") named Kathie Willey the Executrix of his estate and left nothing to Mr. Willey's daughter, Jenine. CP 52-57. Mr. Rekow kept Mr. Willey's original 1985 Will in his files. CP 44.

The Willeys divorced in 1991. CP 73. Ms. Willey moved to Florida. CP 4 ¶ 2.2. In 1995, Ronald Willey asked Mr. Rekow to revise the 1985 Will so that his daughter, Jenine (now Jenine Salvati), would handle his estate and be his sole heir. CP 44-45. Mr. Rekow made the requested revisions. *Id.*; CP 97. Mr. Willey sought additional changes, which Mr. Rekow completed. Mr. Rekow sent the revised will to Mr. Willey in December 1996. CP 45, 58-61, 97-104, 106-11. Mr. Willey did not return a signed copy of that will to Mr. Rekow, and Mr. Rekow heard nothing more from Mr. Willey. CP 45 ¶ 5. Mr. Rekow never learned whether Mr. Willey executed the 1996 will. He was aware, however, that as a general rule, a divorce will negate prior bequests to the former spouse. RCW 11.12.051.

B. Mr. Willey's Death, Jenine Salvati's Appointment as Personal Representative, and Mr. Rekow's Actions

Mr. Willey died on February 18, 2008. CP 4 ¶ 3.2. His daughter, Ms. Salvati, claimed she could not find a will. CP 222-23. Ms. Salvati

retained counsel² and on February 22, 2008, the court appointed her personal representative (and sole heir) of Mr. Willey's intestate estate. CP 113-14. Ms. Willey knew Ms. Salvati was administering the estate; indeed, the two spoke frequently. *See* CP 117, 121-22, 128.³ Ms. Willey also knew that Ms. Salvati claimed Mr. Willey's estate had little value, as she repeatedly told Ms. Willey that "dad had nothing" or was insolvent, and "didn't have a pot to piss in." CP 117, 121-22.

Mr. Rekow had no knowledge of any of this information. His billing records show that Ms. Salvati first called him on October 6, 2008. CP 176. In that conversation, Ms. Salvati informed Mr. Rekow of Mr. Willey's death and that the court had appointed her personal representative and administrator of his intestate estate, and claimed that she had just found a copy of Mr. Willey's 1985 Will.⁴ CP 173, 225; *see* CP 113-14. Ms. Salvati followed up with a letter advising Mr. Rekow that she was

² Byrd Garrett PLLC initially represented Ms. Salvati. CP 223-24.

³ CP 125-55 is a declaration prepared and signed by Ms. Willey's current counsel that was filed in the action probating Mr. Willey's estate. The declaration purports to set out Ms. Willey's version of events connected with Mr. Willey's death and his estate. Ms. Willey admits that she read and approved the declaration and her attorney was acting within the scope of her authority when she signed the declaration. *See* CP 158, 161-62, 167-68, 169-70 (Reqs. for Admis. A-2, B-5 to B-8, and Answers).

⁴ Without citing any evidence, Ms. Willey asserts in her brief that Mr. Rekow knew of Mr. Willey's death in September 2008. Appellants' Br. at 4 ¶ 7. However, in her complaint and in a declaration she alleges that Mr. Rekow received notice of Mr. Willey's death on October 6, 2008. CP 5 ¶ 3.8, CP 149. That is the actual date when Mr. Rekow learned of Mr. Willey's death and it is the only date supported by the evidence. CP 176.

seeing a new lawyer on October 8, and asking “that this [1985 Will] file not be disclosed” until Mr. Rekow received “formal notice” authorizing him to do so. CP 173-74, 176. Mr. Rekow and Ms. Salvati spoke again on October 7 and 9. CP 176.

On October 21, 2008, both Ms. Willey and Ms. Salvati’s new attorney, Pamela McClaran of Foster Pepper, telephoned Mr. Rekow. CP 176. *Id.* Despite Ms. Salvati’s nondisclosure request, Mr. Rekow told Ms. Willey that he had the original 1985 Will and it listed her as the taker. CP 122. In a 2010 probate court submission, Ms. Willey described their conversation as follows:

I asked if he [Mr. Rekow] would represent me[;] he said it would be a conflict of interest so he gave me the name of Mr. Stanberry Foster who I then phoned the same day.

CP 122.⁵

⁵ In a misguided attempt to justify this baseless lawsuit, Ms. Willey now portrays this conversation as one in which Ms. Willey asked Mr. Rekow to “file” the 1985 Will. CP 5-6 ¶ 3.9; Appellants’ Br. at 4 ¶ 10. That revision does nothing to advance her case, as the statutorily required act is a delivery, not a filing. Regardless, even if Ms. Willey did ask Mr. Rekow to “file” the will (unlike Ms. Willey, Mr. Rekow does not purport to remember details of conversations that took place several years ago, *see* CP 15 ¶ 3.9), her request was that Mr. Rekow represent Ms. Willey in a proceeding to have the 1985 Will admitted to probate, and Mr. Rekow declined to do so. That is what Ms. Willey effectively said in 2009, CP 122; and that is what she admitted in her Answers to Respondents’ Requests for Admission, CP 170 (Reqs. for Admis. and Answers B-11, B-12) (Ms. Willey “recalls asking if Mr. Rekow would represent her and file the original will....Mr. Rekow declined representation and referred Plaintiff to Mr. Foster”).

That same day, Mr. Rekow sent a letter to Ms. McClaran which expressly advised that:

I am sending copies of this letter, with enclosures, to Kathie Willey and to Jenine Willey Salvati.

Please let me know if I can be of any further assistance.

CP 44-45. The October 21 letter (a) listed the original documents in Mr. Rekow's file (including the 1985 Will); (b) described Mr. Willey's mid-1990s efforts to change the 1985 Will; and (c) provided copies of relevant documents, including the 1985 Will. CP 44-63; *see* CP 52-57 (the 1985 Will). In the trial court proceedings and Ms. Willey's brief, the letter and attachments are cited as "Exhibit A."⁶

A few days later Ms. McClaran sent Mr. Rekow a copy of the 1985 Will with "Void 2-1-98" written on its face. CP 178-83. In Ms. McClaran's opinion, that document made it "clear that Mr. Willey revoked this [1985] Will on February 1, 1998." CP 178. There is no evidence that Mr. Rekow responded to Ms. McClaran's opinion. *See* CP 176.

Despite having formed an attorney-client relationship with Mr. Foster, *see* CP 122; Ms. Willey contacted Mr. Rekow after he sent the October 21 letter. Mr. Rekow's billing records show that on October 27, 2008, Ms. Willey telephoned him "regarding documents." CP 176. On

⁶ Exhibit A was produced by Ms. McClaran and the Foster Pepper law firm. CP 37.

October 28, 2008, she called again “regarding documents, says Jeanine [sic] told her to call me to get copies – I have sent all I have.” *Id.*

Mr. Rekow had no further contact with anyone regarding Mr. Willey’s estate until August 31, 2009, when Mr. Foster requested that Mr. Rekow “deliver the original Last Will and Testament of Ronald Willey dated March 1, 1985 to my attention for filing ... for probate.” CP 211; *see* CP 176, 185-88. On September 15, 2009, after receiving confirmation that Ms. Willey had authorized Mr. Foster’s will delivery request, Mr. Rekow sent the original 1985 Will to Mr. Foster.⁷ CP 215-16.

C. Ms. Willey’s Retention of Mr. Foster and Efforts to Take Control of Mr. Willey’s Estate

Ms. Willey was determined to wrest control of Mr. Willey’s estate from Ms. Salvati. After Mr. Rekow declined to represent Ms. Willey in a proceeding to admit the 1985 Will to probate, she “hired Mr. Foster to file the original Will and to file a petition with the court removing Ms. Salvati,” CP 128; “as soon as possible,” CP 130-31. Evidently Ms. Willey sent Mr. Foster her Rekow-provided documents, as Mr. Foster’s billing records show that he reviewed “documents sent by client” on November 6,

⁷ Ms. Willey suggests that Mr. Rekow somehow acted wrongfully when he asked for authorization by Ms. Willey. Appellants’ Br. at 13. But Mr. Rekow was being appropriately cautious, and it was prudent, if not required, for Mr. Rekow to confirm that Mr. Foster was in fact representing Ms. Willey and his request for the original 1985 Will was made at her request. *See* CP 176.

2008. CP 185.⁸

Over the next several months, Mr. Foster communicated frequently with Ms. McClaran, who opined that Mr. Willey had revoked the 1985 Will, questioned whether that will survived the Willeys' divorce, and advised that Mr. Willey's estate had little, if any, value. CP 185-88, 190-91, 200, 250-52. By February 2009, Mr. Foster had prepared a petition seeking the relief for which Ms. Willey retained him, *see* CP 193-95;⁹ but both he and Ms. McClaran believed settlement to be a better resolution, given the estate's limited assets. CP 185-88, 193, 205, 250-52 (May 2009 McClaran letter identifying estate assets, advising that creditors could not be paid until Mr. Willey's condominium sold, "there is very little net remaining value of this Estate," and expressing desire to resolve Ms. Willey's "issues ... in the most cost effective manner.").

Ms. Willey has since claimed that she objected to Mr. Foster's settlement efforts and delays in obtaining the original 1985 Will and presenting it to the probate court. CP 130-31, 207-09, 254-58. Among other things, she and her current attorneys have represented that:

⁸ Mr. Foster formally appeared in the probate action on November 18, 2008. CP 331, Doc. 19.

⁹ The petition was titled "Petition for Order: Admitting Will to Probate; Appointing Personal Representative (Bond Waived); Finding Estate Solvent; Granting Nonintervention Powers; Revoking Letters of Administration; and Ordering Accounting and Delivery of Property." CP 194-95.

We have documentation¹⁰] verifying that Mrs. Willey hired Mr. Foster in 2008 with two very specific objectives: one, to file the Will immediately; and two, to take it in front of a judge. Mrs. Willey expressed quite clearly to Mr. Foster that time was of the essence, and as property was liquidated at a probable loss, the proceeds were being converted.

...

Mrs. Willey made numerous contacts with Mr. Foster, both e-mail and telephone. She left numerous messages pleading with him not to negotiate with Ms. McClaran [counsel for Ms. Salvati] and to file the Will and let the court make the judicial determination. Even if the court would have ruled against Mrs. Willey, she would not have continued to build up the fees and costs both to Mr. Foster but also personally.

...

...Mr. Foster knew since 2008 where the Will was and never attempted to obtain possession.

CP 208.

On August 4, 2009, Ms. Salvati asked Ms. Willey to decide by no later than September 4, 2009, whether she would take legal action. CP 213. Ms. Willey must have decided to proceed, because on August 31, 2009, Mr. Foster asked Mr. Rekow for the original 1985 Will, CP 211;

¹⁰ The only “documentation” of which Respondents are aware (and the only “documentation” in the record) is an April 2009 email from Ms. Willey to Mr. Foster stating:

I believe its [sic] time to dismiss any mediation and file a petition with the court and allow Jenine and her attorney to explain to the judge why as of this date there was no will ever filed and justify the liquidation of the estate. Its [sic] evident that Jenine has been in control with this entire process from the get go. I believe it is time that Jenine’s rein [sic] of control now ceases. This has gone on long enough and it is time now to take our own control and take this to court.

CP 155.

and on September 29, 2009, he petitioned the probate court to set a date for hearing and resolving issues related to the 1985 Will's validity, CP 72-84. The court held a hearing on that petition on October 22, 2009. CP 218, 227-28. As Mr. Foster had requested, the court directed that the matter be "set for hearing to determine whether the will will be admitted." CP 218. The original 1985 Will was then filed with the court. CP 218-19.

After the October 22 hearing, Ms. Salvati decided that the estate's size did not justify incurring additional legal fees, and agreed to resign as personal representative. *See* CP 227-28. The probate court accepted Ms. Salvati's resignation on December 17, 2009, appointed Ms. Willey successor personal representative, and admitted the 1985 Will to probate. CP 231-35. Because Ms. Salvati resigned, the issues of whether the Willeys' divorce and Mr. Willey's bequest-changing efforts had invalidated the 1985 Will were never decided.

D. Ms. Willey's Subsequent Litigation Efforts and the Instant Suit

1. The Pursuit of Ms. Salvati

By October 2008, when Mr. Rekow first learned of Mr. Willey's death, Ms. Salvati had disposed of most of her father's business assets and personal belongings. Ms. Salvati had sold most, if not all, vehicles possessed by Mr. Willey's business, Willey Auto Wholesale, Inc. CP 224 ¶ 12 (Salvati declaration describing sale of Mr. Willey's vehicles for the outstanding debt amount or less); CP 288-90 (Interrog. Answer 4)

(identifying vehicle sale dates). She had allowed Mr. Willey's nearly new motorhome to be repossessed. *See* CP 224-25 ¶ 14, 237-39, 290 (Interrog. Answer 5). She had given away most of Mr. Willey's personal items or reported them stolen, CP 222-23, 241-43; and admittedly used estate assets to help support her family, CP 245-46 ¶¶ 1-2.

Mr. Rekow did not know Ms. Salvati and was unaware of her alleged mismanagement of the estate. Ms. Willey, however, had long questioned Ms. Salvati's credibility, CP 122; and by no later than November 2008, knew that Mr. Willey's estate (which she had believed to be sizeable) no longer had any value, CP 117, 121-22, 190-91. Nonetheless, Ms. Willey chose to devote substantial time and money to acquiring control of the estate and pursuing Ms. Salvati.¹¹ In February 2010 (after Ms. Salvati's resignation), Ms. Willey retained her current attorneys, who billed Ms. Willey nearly \$100,000 to recover \$83,522.77 from Ms. Salvati. CP 246-47, 303-04. The order requiring such payment specified that the \$83,522.77 was to "repay the Estate of Ronald Willey ... for the funds converted to her [Ms. Salvati's] own use[.]" CP 247. It further established that for purposes of this case, possession of a copy of the 1985 Will constitutes "control" of the Will, as it declared that "Jenine

¹¹ At the time no one even suggested that Mr. Rekow had done anything wrong or that he should have delivered the original 1985 Will to Ms. Willey.

Salvati and her attorney, Ms. McClaran, had control over the last will of Ronald Willey for over 1 year and did not file the will[.]” CP 246.

2. Ms. Willey’s Claims Against the Involved Lawyers and Respondents

In August 2011, Ms. Willey sent demand letters to her former attorney, Mr. Foster (to whom she owed over \$56,000), and Ms. Salvati’s attorneys. CP 254-66, 268-71. In allegations reminiscent of those she now makes against Mr. Rekow, Ms. Willey accused Mr. Foster of “making a judicial determination” about the validity of the 1985 Will. CP 257. She also accused Mr. Foster of engaging in negotiations “for over a year instead of filing the Will with the court which would have put an end to the bleeding of the assets[.]” *Id.* She further alleged that although Mr. Foster “eventually did excellent legal work ... it unfortunately came over a year late and at which time the damage was all but irreversible.” CP 258. Indeed, according to Ms. Willey, when Mr. Foster took steps to file the will and have it admitted to probate in September 2009, it was “*over a year after the liquid assets of the Estate had been spent.*” CP 151 (emphasis added). As she had done with Ms. Salvati, Ms. Willey settled with Mr. Foster and Ms. McClaran. CP 273-74; *see* CP 276.

Ms. Willey then filed the instant action, which seeks hundreds of thousands of dollars in damages based on several causes of action that all

claim Mr. Rekow willfully violated RCW 11.20.010. CP 3-12, 310 (alleging minimum damages of \$650,000). That statute provides:

Any person having the custody or control of any will shall, within thirty days after he or she shall have received knowledge of the death of the testator, deliver said will to the court having jurisdiction or to the person named in the will as executor, and any executor having in his or her custody or control any will shall within forty days after he or she received knowledge of the death of the testator deliver the same to the court having jurisdiction.^[12] Any person who shall wilfully violate any of the provisions of this section shall be liable to any party aggrieved for the damages which may be sustained by such violation.

RCW 11.20.010; see CP 3-12.

The specific claims alleged in the complaint against Mr. Rekow and his law firm are: (1) Breach of Fiduciary Duty to Estate; (2) Breach of Fiduciary Duty to Third Party (Kathie Willey as heir of the Estate); (3) Professional Negligence; and (4) Negligence. CP 8-11. As this litigation progressed, Ms. Willey conceded that Mr. Rekow was not her attorney at any relevant time, owed no professional or fiduciary duties to her, she is not suing for malpractice, and her various causes of action all are premised on the theory that “Mr. Rekow had a **legal duty** ... *to file*”^[13] the original

¹² Ms. Willey makes frequent reference in her brief to “citizen heirs” and creditors supposedly prejudiced by Mr. Rekow’s “failure to file” the 1985 Will. Ms. Willey knew the “citizen heirs” and knew where they resided. She could (and under RCW 11.20.010 should) have provided them with notice. Similarly, she could (and should) have promptly delivered the 1985 Will to the probate court but chose not to do so. If any third party was prejudiced, that prejudice resulted from Ms. Willey’s inaction, not Mr. Rekow’s alleged statutory violation.

¹³ That is incorrect. The statutory duty is to “deliver,” not “file,” a Will.

will in his possession within 30 days.” CP 294 (Interrog. Answers 13-14 (bold italics added)); CP 322; *see also* CP 281, 294 (Interrogs. 13-14 and Answers); CP 283, 296 (Req. for Prod. 12 and Resp.); CP 322 (Ms. Willey’s argument she is “suing Mr. Rekow for a violation of RCW § 11.20.010.”).

That is true even of the so-called “Negligence” claim that Ms. Willey is attempting to resurrect on appeal. *See* Appellants’ Br. at 18-20. It, too, is premised on an alleged violation of RCW 11.20.010, a statute that can be violated only by *willful* conduct. As Ms. Willey alleged:

7.1 Defendant Rekow violated Washington State Statute § 11.20.010 by not filing the original Will of Ronald Willey in his possession for 13 months after notice that Mr. Willey had died.

7.2 Mr. Rekow’s negligent violations and inaction caused considerable damage to the Estate of Ronald Willey.

7.3 As per the Revised Code of Washington § 11.20.010, Defendant[s]...*willfully violated the statute* and are liable to plaintiffs ... for the damages they sustained as a result of said violation.

CP 11 (emphasis added). Thus even had Ms. Willey sought to segregate her negligence claim from her other claims at summary judgment (which she did not), neither the plain language of the statute, nor the record, would have permitted her to do so.

Ms. Willey’s alleged \$650,000 in damages include personal expenses and business losses purportedly suffered while she sought

control of and/or administered Mr. Willey's estate. CP 11 ¶ 8.1, 293 (Interrog. Answer 10). She describes these damages as ones incurred "in order to obtain her place as rightful heir and then to protect the remaining estate assets from loss and foreclosure." *Id.*; see CP 123 (describing trips to attend hearings and "prepare and sell the condo."). Ms. Willey has offered no evidence showing that these damages resulted from Mr. Rekow delivering a copy of the 1985 Will, rather than the original, in October 2008.

Ms. Willey also alleges as damages, the nearly \$100,000 in fees her current attorneys charged to obtain the 2011 agreed order requiring Ms. Salvati to repay the estate \$83,522.77. CP 11 ¶ 8.1, 245-47, 303-04. Ms. Willey retained those attorneys in 2010, after Ms. Willey had been appointed personal representative and after the 1985 Will had been admitted to probate. CP 232-35, 280, 293 (Interrog. 9 and Answer); CP 282, 296, 299, 303-04 (Req. for Prod. 7 and Answer); CP 332 (Doc. 53). Again, Ms. Willey offers no evidence linking those damages to Mr. Rekow's actions.

Ms. Willey additionally seeks recovery of damages the estate allegedly suffered from Ms. Salvati's mismanagement. CP 11 ¶ 8.1. That damage claim has evolved from one blaming Respondents for Ms. Salvati's disposition of those assets (conduct that predated Mr. Rekow's knowledge of Mr. Willey's death), into a theory that Mr. Rekow's failure

to deliver the original will to Ms. Willey in November 2008 somehow allowed Ms. Salvati to continue to use estate “assets as income through December 17, 2009.”¹⁴ CP 170-171 (Reqs. for Admis. Answers B-14 to B-18); CP 279, 281, 288, 294-95 (Interrogs. 4, 16 and Answers). But Ms. Salvati already repaid the estate for those losses, CP 247; Ms. Willey admits that all liquid estate assets were gone by November 2008, CP 151; and Ms. Willey’s assertion that Ms. Salvati would have acted differently had Mr. Rekow given Ms. Willey the original 1985 Will, rather than a copy, is not only sheer speculation, it is belied by Ms. Willey’s testimony that Ms. Salvati used estate assets in 2009 because both she and her husband were unemployed, CP 336.

Respondents sought discovery from Ms. Willey, Ms. Salvati, the attorneys involved in the underlying case, and various banks. *E.g.*, CP 157-68, 278-87; *see* CP 44-63, 259-63, 276 (Foster Pepper production); CP 185-88, 190-91, 207-09, 250-58, 268-74 (Williams Kastner Gibbs production); CP 213 (Salvati production); CP 237-39, 264-66 (Byrd & Garrett production). Respondents then moved for summary judgment, seeking dismissal on any one of three dispositive grounds:

- (1) Mr. Rekow met statutory *delivery* requirements when he provided a copy of Mr. Willey’s 1985 Will to Ms. Salvati

¹⁴ December 17, 2009 is the date the probate court appointed Ms. Willey personal representative. CP 218-19, 231-35. It has no discernible connection to Mr. Rekow.

and Ms. Willey and informed them that he was holding the original document;

- (2) Even if Mr. Rekow failed to meet statutory *delivery* requirements, his disclosure efforts established that he did not act *willfully*; and/or
- (3) Ms. Willey produced no evidence of any damages “sustained” or proximately caused by Mr. Rekow’s alleged misconduct (whether statutory or negligence-based), and as a matter of law, any causal connection between Mr. Rekow’s acts and her alleged damages was broken once Ms. Willey was aware of the 1985 Will and/or when she retained Mr. Foster to *file* the will “as soon as possible.”

CP 20-35. Respondents supported their motion with roughly 250 pages of documentary evidence. CP 36-304.

Ms. Willey’s summary judgment opposition said much about the validity of her claims. Rather than submitting evidence supporting her allegations, she tried to discredit Mr. Rekow and his attorneys with accusations and misstatements, and to create issues of fact by making conclusory assertions and misrepresenting Respondents’ arguments. CP 305-27. To cite just a couple of examples:

- Ms. Willey asserted that “Mr. Rekow denied Mr. Foster’s first demand [for the original will] claiming ‘conflict of interest.’” CP 313.

However, there is no evidence of any communication between Mr. Rekow and Mr. Foster before August 31, 2009, *see* CP 176, 185-88; and it is uncontested that Mr. Rekow promptly complied with Mr. Foster’s August 31, 2009, will delivery request, CP 211, 215-16. Tellingly, Ms. Willey’s

declaration – the very “evidence” cited in support of the denial assertion – says nothing about Mr. Foster or his “first demand.” CP 313, 334-37.¹⁵

- Ms. Willey asserted that Respondents had claimed at Page 3, Lines 6-10 of their summary judgment motion “that Mr. Rekow made an expert analysis that the will was void as of 2/1/98,” and that by so doing, Mr. Rekow “intentionally overstepped his legal authority by making a quasi judicial determination of the validity of the Last Will and Testament of Ronald Willey.” CP 316-17 (citing CP 24:6-10).

But the cited material merely summarized Mr. Rekow’s October 21, 2008 letter and attachments (CP 44-63), and described Ms. Salvati’s attorney’s response as follows:

Ms. McClaran’s office responded by sending Mr. Rekow a copy of the 1985 Will from Mr. Willey’s files on which Mr. Willey had written ‘Void 2-1-98,’ and advising that Ms. Salvati’s attorneys believed it ‘clear’ that Mr. Willey had ‘revoked’ the 1985 Will.

CP 24 (citing McClaran letter, CP 178-83). A statement in a brief summarizing the actions and opinions of *Ms. McClaran* and her staff in no way evidences Mr. Rekow engaging in a “quasi-judicial analysis.”

Ms. Willey also sought to avoid dismissal with speculation, conjecture, and references to undisclosed evidence. Thus she argued that the trial court should deny summary judgment because she “*will prove in trial* that Mr. Rekow withheld the will intentionally in order to assist Ms. Salvati in maintaining her position as sole heir.” CP 319 (emphasis added). Not only is that insufficient under CR 56, Ms. Willey did not

¹⁵ Other misstatement examples are described at nn.4-5, *supra*.

provide or even attempt to describe the “evidence” she intended to use as proof of such a conspiracy. CP 319, 334-37. Her accusation was (and is) pure speculation, wholly unwarranted, and inconsistent with the evidentiary record.¹⁶

Ms. Willey similarly failed to describe (let alone submit specific evidence of) the “damages” purportedly caused by Mr. Rekow’s alleged violation of RCW 11.20.010. She relied instead on the declarations she used to attack Ms. Salvati, impeach her character, and describe Ms. Salvati’s actions immediately after Mr. Willey’s death, CP 347-61; and her own conclusory statement that after November 2008, Ms. Salvati:

[C]ontinued to liquidate the assets of the Estate for below value and converted the Estate property to her personal use. She and her husband ... lived off those assets. Both Salvatis were unemployed during that time. Further, Jenine ignored creditors’ claims and actions, property and other assets were repossessed or left in serious disrepair and assets were being wasted.

CP 336. With respect to proximate cause, Ms. Willey could only aver that “I believe Mr. Rekow’s ... inaction caused considerable economic damage to the Estate of Ronald Willey and to me personally.” CP 337.

The trial court reviewed the record and heard oral argument. Ms. Willey’s argument paralleled her written submission: she described Ms.

¹⁶ The absurdity of Ms. Willey’s conspiracy theory is shown by, among other things, Mr. Rekow’s October 2008 disclosure to Ms. Salvati and Ms. Willey of all documents in his possession – including the original 1985 Will. *See* CP 44-63.

Salvati's poor character and pre-October 2008 wrongdoing, RP 17, 19; made inaccurate (and unsupported) statements about Mr. Rekow, RP 19-21¹⁷; conflated delivery and filing; and continued to speculate about Mr. Rekow's "quasi-judicial" analysis and his desire to aid Ms. Salvati, RP 20-22. Ms. Willey also argued for application of the WPI 14.01 definition of "willful misconduct." RP 18, 25.

The trial court granted Respondents' motion to dismiss all of Ms. Willey's claims, including her unfounded negligence claim. The court explained that while Ms. Willey likely had been "wronged by the actions of Ms. Salvati," Mr. Rekow's distribution of a copy of the 1985 Will with his October 21, 2008 letter ("Exhibit A"), established as a matter of law that he did not commit "a willful violation of RCW 11.20.010." RP 26 (emphasis added).

In so doing, the court rejected Ms. Willey's theory (one Ms. Willey has apparently abandoned on appeal) that Mr. Rekow willfully conspired with Ms. Salvati to deprive Ms. Willey of her rights:

¹⁷ For example, Ms. Willey claimed to have "asked Mr. Rekow for the will in October 2008, and Mr. Rekow would not give it to her[.]" RP 19. Ms. Willey's prior averments confirm that this statement was pure fiction. *See supra* at 7 & n.5. Ms. Willey claimed that Mr. Rekow drafted the Willeys' divorce property settlement. RP 19. He did not. (The Willeys' divorce attorneys were John Blackburn and Robert McConnell. King Cnty. Superior Court No. 91-3-06930-5). She claimed that Mr. Rekow rejected Mr. Foster's first request for the original 1985 Will with a letter saying "I don't think so, she has conflict, I have conflict, I can't release the will." RP 21. There is no evidence of any such letter. Surely if the letter existed, Ms. Willey would have filed it with her response. She did not.

T]he case law indicates that ... the purpose behind the statute is to ensure that wills are discovered and disclosed and not hidden. Mr. Rekow did not accede to the wishes of Ms. Salvati in her letter which says basically let's, you know, don't disclose this keep this quiet.

RP 26 (citing Exhibit A).

The Court also recognized that Mr. Rekow acted appropriately given the circumstances. As the Court astutely observed, Mr. Rekow was:

[I]n a very unusual position, and in the Court's view Exhibit #A indicates he did what was required of him under the statute.... by providing a copy of the will by indicating he had and was maintaining the original will....*Mr. Rekow is preserving the status quo....He discloses what he has to disclose.*

RP 27 (emphasis added).

Finally, the Court reiterated that Mr. Rekow's detailed actual disclosure was wholly inconsistent with willful conduct:

And so it's that willfulness, that willful violation that the Court finds that as a matter of a law there is not evidence before the Court upon which any rational trier of fact could conclude there was willful, there's not a question of fact before the Court on the willfulness. And I'm reading from the willful misconduct pattern instruction 14.01, intentional doing of an act or refraining from the doing of an act that one has the duty to do when he or she has actual knowledge of the peril that will be created and intentionally fails to avert injury or actually intends to cause harm....[T]he lack of willfulness in light of Exhibit #A answers the question.

RP 27-28.

The trial court entered summary judgment for Respondents. CP 370-71. Its order encompassed all of Ms. Willey's claims, which was fully warranted since every one of her claims was expressly based on

RCW 11.20.010 and her summary judgment briefing admitted that was the case. CP 8-11, 322. This appeal timely followed.

IV. ARGUMENT

A. Summary Judgment Standards and Standard of Review

Review of a summary judgment ruling is de novo. *E.g., Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010). The purpose of summary judgment is to avoid a useless trial. *Johnson v. Rothstein*, 52 Wn. App. 303, 307, 759 P.2d 471 (1988). Thus a moving party is entitled to judgment as a matter of law when, as is the case here, the non-movant fails to make a sufficient showing on an essential element of its case. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). “In such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.” *Id.* (citation omitted).

To make the showing necessary to defeat summary judgment, a party must “set forth specific facts showing that there is a genuine issue for trial,” and the specific facts relied upon must be admissible in evidence. CR 56(e).

A fact is an event, an occurrence, or something that exists in reality. It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. The “facts” required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or

conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice.

Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (citations omitted). Put differently, a non-movant must demonstrate the basis for her assertions with detailed and specific facts that would justify a jury or court finding in her favor after considering all of the evidence. *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008). She cannot rely on speculation, argumentative assertions that unresolved factual issues remain, or on having her affidavit considered at face value. *Id.*; *Sanders v. Woods*, 121 Wn. App. 593, 600, 89 P.3d 312 (2004).

Ms. Willey did not submit any evidentiary facts to the trial court that established any element essential to an RCW 11.20.010 violation: (1) a failure to “deliver;” (2) “willful” conduct; (3) damages; and (4) causation. Since all of Ms. Willey’s causes of action – no matter how they are labeled – are premised on Mr. Rekow’s alleged violation of his statutory duties, and because she produced no evidence of harm proximately caused by Mr. Rekow (irrespective of any legal theory alleged), that is dispositive.

B. Ms. Willey’s Claims Fail Because Mr. Rekow Did Not Willfully Fail to Timely Deliver the Will to the Executor Named Therein

1. Mr. Rekow timely delivered the Will to Ms. Willey

Ms. Willey filed this action seeking over \$650,000 in damages

based on the theory that Mr. Rekow “failed to file the Will” in violation of RCW 11.20.010. CP 3-12 at ¶¶ 3.12, 3.13, 3.16, 6.1, 7.1; Appellants’ Br. at 4, 6-8; *see* CP 310. Because the statute required Mr. Rekow to deliver the 1985 Will, not file it, Ms. Willey’s theory is untenable.

Ms. Willey largely ignores that RCW 11.20.010 allows delivery either to the executor named in the will or to the court. RCW 11.20.010. Delivery to the court has been equated with petitioning a court to admit a will to probate. *In re Hyde’s Estate*, 190 Wash. 88, 92-93, 66 P.2d 856 (1937). But Mr. Rekow declined Ms. Willey’s request that he undertake that task. Instead he made delivery to Ms. Willey, the executor named in the 1985 Will. CP 44-63. Mr. Rekow did so in a timely manner. He mailed a copy of the 1985 Will to Ms. Willey on the same day that he first spoke with her and learned of her whereabouts, and just 15 days after he first learned of Mr. Willey’s death. *Id.*, CP 176.

Ms. Willey argues that providing a will copy is not a “delivery” for purposes of RCW 11.20.010. She cites no authority for that proposition, which ignores that the statute does not expressly require “delivery” of the original document. Nor does she explain why it would be appropriate to read “original” into the statute. In fact, there is no basis for so doing.

Statutes such as RCW 11.20.010 are based on the Uniform Probate Code. Unif. Probate Code § 2-516; *see* Annot., *Constitutionality, construction, and application of statute requiring production of wills for*

probate or declaring consequences of failure or delay in that regard, 119 A.L.R. 1259 (1939). Their purpose is “to exact the discovery of wills” and prevent their concealment, and thereby safeguard the integrity of testamentary dispositions. 95 C.J.S. WILLS § 464 (2011); *Snyder v. Security-First Nat’l Bank*, 31 Cal. App. 2d 660, 88 P.2d 760, 763 (1939); *Hyde’s Estate*, 190 Wash. at 93. These statutory purposes were fully satisfied by Mr. Rekow’s delivery of a copy of the 1985 Will to Ms. Willey and his clarification that the original document was in his files. CP 44-63. The 1985 Will had unquestionably been “discovered” and it was in no way “concealed.”

Moreover, it is unlikely the Legislature intended that RCW 11.20.010 would specifically mandate delivery of an original will. That requirement would do nothing to advance the statute’s intended purpose (facilitating the discovery of wills), and in fact could undermine that purpose by limiting the delivery requirement’s scope to only original documents. That would be problematic since, as Respondents noted in their motion, copies of wills can have the same effect as the original; and because “even ‘a photographic copy’ of a will can be admitted to probate,” it would be inappropriate to read an original document requirement into RCW 11.20.010. CP 30 (citing RCW 11.20.020(2), .070; and *In re Estate*

of *Nelson*, 85 Wn.2d 602, 606-07, 537 P.2d 765 (1975)¹⁸). Ms. Willey refuses to address that common sense analysis and instead accuses Respondents of “misrepresent[ing] the law.” Appellants’ Br. at 16-17; CP 320-21. Her accusation is baseless. It is not a misrepresentation of law to advance a statutory interpretation by accurately citing related statutes and case law.

Finally, under the facts of this case, Mr. Rekow’s delivery of a copy must be deemed to have satisfied statutory requirements. Pursuant to the order entered by the probate court on Ms. Willey’s motion, possession of a copy of the 1985 Will gives one control over that document. *See* CP 246. Ms. Willey thus is judicially estopped from claiming that Mr. Rekow’s delivery was somehow ineffective or inadequate. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007) (judicial estoppel precludes party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position).

2. Mr. Rekow did not act willfully

Assuming *arguendo* that Mr. Rekow was statutorily required to deliver the original 1985 Will to Ms. Willey, dismissal still was warranted. As the trial court determined, there is simply no evidence from which any reasonable person could find that Mr. Rekow’s failure to deliver the

¹⁸ Statutorily superseded on other grounds, as stated in *In re Estate of Black*, 153 Wn.2d 152, 161-62, 102 P.3d 796 (2004).

original document was “willful.” RP 26-28. When reasonable minds could not differ, factual questions are decided as a matter of law and it is error to submit the issue to a jury. *E.g., Hoops v. Burlington N., Inc.*, 83 Wn.2d 396, 403, 518 P.2d 707 (1974) (error to submit willfulness question to jury); *Minahan v. W. Wash. Fair Ass’n*, 117 Wn. App. 881, 894-95, 73 P.3d 1019 (2003) (court may decide foreseeability as a matter of law when reasonable minds would not differ on the question). Ms. Willey’s question-of-fact arguments ignore this rule.

The parties offered different definitions of “willful” to the trial court. Respondents cited Washington’s common law definition. CP 30-31. Ms. Willey proffered WPI 14.01. RP 18, 25. The trial court adopted Ms. Willey’s WPI definition, *see* RP 27; and assessed the “evidence” of Mr. Rekow’s willfulness under WPI 14.01, which states:

Willful misconduct is the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has the duty to do when he or she has actual knowledge of the peril that will be created and intentionally fails to avert injury or actually intends to cause harm.

Ms. Willey now seems to argue that “willful” means a voluntary and intentional act performed with a specific intent to fail to do something the law requires to be done. Appellants’ Br. at 12. Ms. Willey did not proffer that definition of “willful” to the trial court and the trial court used the WPI definition at her request. CP 305-27; RP 18, 25, 27. Those facts

preclude use of Ms. Willey’s newly-proposed definition, both because appellants cannot make new arguments on appeal, RAP 9.12; and because the invited error doctrine applies here. “Under the doctrine of invited error, a party cannot set up an error and then complain about it on appeal.” *State v. Schaler*, 169 Wn.2d 274, 302-03, 236 P.3d 858 (2010).

Regardless, Ms. Willey’s new definition is without legal basis. The non-Washington sources from which Ms. Willey crafts that definition do not support removing intent to cause harm from the definition of willful. In *Screws v. United States*, 325 U.S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945); the Court held that for purposes of former 18 U.S.C. § 52, proof of willful conduct requires proof of a specific “bad purpose.” 325 U.S. at 101-07. Likewise, Ms. Willey’s highly edited excerpt from BLACK’S LAW DICTIONARY omits that treatise’s decades long recognition of the “bad purpose” component of willfulness. BLACK’S LAW DICTIONARY 1737 (9th ed. 2009); *see also* BLACK’S LAW DICTIONARY 1434 (5th ed. 1979) (defining willful as “[i]ntending the result which actually comes to pass.”).

Moreover, RCW 11.20.010 is a Washington statute properly interpreted under Washington law. Our Supreme Court has repeatedly held that “[w]illful’ requires a showing of actual intent to harm, while ‘wanton’ infers such intent from reckless conduct.” *Zellmer v. Zellmer*, 164 Wn.2d 147, 155 n.2, 188 P.3d 497 (2008) (citing *Adkisson v. City of*

Seattle, 42 Wn.2d 676, 684-85, 258 P.2d 461 (1953)).¹⁹ The requirement of intent to cause harm applies in cases involving application of probate laws as well as in other contexts. Consistent with *Zellmer*, it has been held that under the probate laws, one must act intentionally and designedly to act willfully. *In re Estate of Kissinger*, 166 Wn.2d 120, 130-31, 206 P.3d 665 (2009) (applying common law definition to slayer statute, RCW 11.84.010); accord *New York Life Ins. Co. v. Jones*, 86 Wn.2d 44, 47, 541 P.2d 989 (1975). One acts designedly when he or she acts in accord with “[a] plan or scheme” or with “purpose or intention combined with a plan.” BLACK’S LAW DICTIONARY 511 (9th ed. 2009) (defining design).

No matter what willful definition the court uses, there is no evidence of willful conduct by Mr. Rekow. There is certainly no evidence that he intended to cause harm to Ms. Willey. To the contrary, Mr. Rekow’s October 21 letter established beyond question his intent to fully inform Ms. Willey of the 1985 Will’s contents and location, and disproved Ms. Willey’s now-abandoned theory that Mr. Rekow conspired with Ms. Salvati. CP 44-63; *see* CP 319-20. And, given that RCW 11.20.010 does not expressly require delivery of an original document, the October 21, 2008 letter even rebuts Ms. Willey’s new argument that Mr. Rekow intentionally violated that statute by “knowingly” sending her a copy of

¹⁹ Notably, no authority suggests that “willful” or “wanton” conduct can be established through a showing of mere negligence. In fact, the *Hoops* court held the opposite. 83 Wn.2d at 404-05.

the 1985 Will rather than the original. One cannot intentionally violate an unexpressed or unknown statutory term. As the *Screws* Court recognized, to hold otherwise would violate due process. 325 U.S. at 94-107.

C. Ms. Willey Failed to Provide Evidence Creating a Genuine Issue of Fact Regarding Damages and Causation

Even if Ms. Willey could somehow demonstrate non-delivery and willful conduct, her lawsuit and appeal still fail because she failed to establish that Ms. Willey suffered any delayed-filing damages at all, let alone that Mr. Rekow's delivery of a copy of the 1985 Will, rather than the original document, caused the damages about which she complains. Only damages "sustained by," i.e., proximately caused by, a willful violation of RCW 11.20.010 are recoverable.

1. Ms. Willey failed to establish damages

To recover under RCW 11.20.010, a party must have been damaged by a violation of the statute. Ms. Willey failed to proffer evidence (as opposed to speculation and conclusory assertions) supporting her alleged damages. *See* CP 334-37. That is dispositive, particularly in light of the substantial evidence demonstrating that Ms. Willey's damage averments are spurious.

For example, although Ms. Willey claims personal damages such as the loss of her business and estate-administration expenses, she offers no details. Under *Grimwood* and its progeny, it is simply not enough to

say, for instance, that one had to fly to Seattle multiple times or that one's business failed. One must provide specific evidence of the date and cost of the flights and the purposes of the trips, and specific evidence identifying the business and the actual losses incurred. 110 Wn.2d at 359-60. There is no such evidence in the record. *See* CP 293.²⁰

As for the estate's alleged losses, Ms. Willey has taken the position that Ms. Salvati disposed of most estate assets *at a loss* before November 2008, well before Mr. Rekow first learned of Mr. Willey's death. CP 288-90 (Interrog. Answers 4-5). Indeed, she has admitted that by November 2008, the estate had no liquid assets, which perhaps is the reason she did not at least seek a restraining order against Ms. Salvati. CP 151.

Ms. Willey has also admitted that she cannot prove the estate's damage claims. She answered interrogatories seeking information about those claims by objecting that they "require[] definite knowledge of the actions of a third party [i.e., Ms. Salvati]," and by conceding that she does not know what estate property is unaccounted for, let alone when it went missing. CP 288-89 (Interrog. Answer 4); CP 290-91 (Interrog. Answer 6); CP 294-95 (Interrog. Answer 16 citing Answer 4).

²⁰ The most specific evidence pertaining to these damage claims establishes that they are for expenses Ms. Willey incurred to attend probate court hearings and to sell Mr. Willey's condominium. CP 123. She incurred those expenses because she took action to remove Ms. Salvati as administrator of the estate, not because of anything Mr. Rekow did or did not do.

But perhaps the most important reason for rejecting the estate's damage claim is that the estate already recovered from Ms. Salvati, the losses it allegedly incurred from her misconduct. CP 247; *compare* CP 136-37, 143-44 (losses asserted against Ms. Salvati) *with* CP 289-92 (losses asserted against Mr. Rekow). Ms. Willey's estate-based damage claim seeks a double recovery, which the law does not allow. *Monjay v. Evergreen Sch. Dist.*, 13 Wn. App. 654, 658, 537 P.2d 825 (1975).

2. Even if Ms. Willey had established that she and the estate incurred damages, they failed to establish the element of proximate cause

Not only did Ms. Willey fail to establish damages, she failed to demonstrate that Mr. Rekow's delivery of a copy of the 1985 Will rather than the original, was the cause of whatever damages she claims. Proximate cause has two components: cause in fact and legal cause. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Cause in fact is a fact-based inquiry into the physical connection between an act and an injury. Cause in fact can properly be determined as a question of law when, as here, the facts are not in dispute and the inferences therefrom are incapable of reasonable doubt or difference of opinion. *E.g., Christen v. Lee*, 113 Wn.2d 479, 507-08, 780 P.2d 1307 (1989). A plaintiff must supply evidence from which cause in fact can be inferred; causation cannot be premised on speculation and conjecture. When there is nothing more tangible to proceed upon than two or more conjectural theories,

under one or more of which a plaintiff would not be permitted to recover, there is no question for the jury. *Garcia v. State*, 161 Wn. App. 1, 16, 270 P.3d 599 (2011); *Moore v. Hagge*, 158 Wn. App. 137, 148, 241 P.3d 787 (2010).

Legal cause “is grounded in policy determinations as to how far the consequences of a defendant's acts should extend.” *Crowe v. Gaston*, 134 Wn.2d 509, 518, 951 P.2d 1118 (1998). “It involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact.” *Hartley*, 103 Wn.2d at 779. “[T]he question in a legal causation analysis is whether, as a matter of policy, the connection between the defendant's act and its ultimate result is ‘too remote or insubstantial to impose liability.’” *Cunningham v. State*, 61 Wn. App. 562, 572, 811 P.2d 225 (1991) (quoting *Hartley*, 103 Wn.2d at 781). Whether legal cause exists is a question of law for the court. *E.g.*, *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 204, 15 P.3d 1283 (2001).

As a matter of law, neither component of proximate cause is present when the chain of causation is broken by an intervening cause. Put differently, for a plaintiff to establish causation “[t]here must be a direct, unbroken sequence of events that link the actions of the defendant and the injury to the plaintiff.” 16 David K. DeWolf & Keller W. Allen, WASH. PRACTICE, TORT LAW & PRACTICE § 4.2 at 144-45 (3d ed. 2006). “[I]f a new, independent act breaks the chain of causation, the original

negligence is no longer a proximate cause of the injury and the defendant is *not liable* for the injury.” *Id.* § 4.23 at 163 (emphasis added).

Ms. Willey’s claims against Respondents do not meet any of these proximate cause requirements. Ms. Willey failed to provide any evidence that actually links the conduct about which Ms. Willey complains, i.e., Mr. Rekow’s delivery of a copy of the 1985 Will rather than the original, to her alleged damages, whatever they may be. Ms. Willey’s speculation about what Ms. Salvati did, and her conclusory claims about resultant harm, are simply not enough to establish cause in fact and survive summary judgment. CP 336-37; *e.g.*, *Grimwood*, 110 Wn.2d at 359-61; *Moore*, 158 Wn. App. at 148; *Doty-Fielding*, 143 Wn. App. at 566.

Even were that not the case, there is no basis for finding that legal cause is present here. Mr. Rekow was unaware that Ms. Salvati was mishandling the estate. Assuming *arguendo* that Mr. Rekow technically violated RCW 11.20.010 by delivering a copy of the 1985 Will to Ms. Willey rather than the original, he acted impartially by fully disclosing critical information so that both Ms. Willey and Ms. Salvati could make reasoned decisions about how to proceed. Ms. Willey, on the other hand, had long suspected Ms. Salvati of mishandling the estate, knew the terms of the 1985 Will and where the original was located, but still waited nearly a year to perform her statutory duty – to petition to have the 1985 Will admitted for probate. CP 44-63, 72-84; *see Hyde’s Estate*, 190 Wash. at

92-93. (Of course, once she did decide to proceed with that petition, she requested the original 1985 Will from Mr. Rekow for filing, and he promptly provided it to her. CP 211, 215-16.) Given these undisputed facts, if Ms. Willey or the estate suffered any damages at all, the connection between Mr. Rekow's minor error and those damages is far too tenuous and remote to support imposing liability. *Cunningham*, 61 Wn. App. at 572.

Ms. Willey's attempts to equate RCW 11.20.010's statutory delivery requirement with "filing" do not change these results. Even if Mr. Rekow had "filed" the original 1985 Will with the probate court, that act would have had no effect. Under Washington law, a will is ineffective for any purpose and is not evidence of a right or title until it is formally established by probate. *In re O'Brien's Estate*, 13 Wn.2d 581, 590, 126 P.2d 47 (1942); *Hyde's Estate*, 190 Wash. at 92-93. Mr. Foster, not Mr. Rekow, was the attorney responsible for formally establishing the 1985 Will by probate. Until he did so, Ms. Salvati had legal control of Mr. Willey's estate and the right to administer the estate however she chose.

In any event, once Ms. Willey hired Mr. Foster "to file the Will immediately; and ... take it in front of a judge," any causal link between Mr. Rekow's alleged statutory violation and Ms. Willey's purported damages, was severed. CP 208; see CP 256-58. Mr. Rekow learned of Mr. Willey's death on October 6, 2008. CP 176. Within 30 days of that

date, Ms. Willey had retained Mr. Foster to file the 1985 Will as soon as possible. CP 128, 130-31. She claims to have told Mr. Foster that “time was of the essence,” and “plead[ed] with him not to negotiate with [Ms. Salvati’s attorney] and to file the Will and let the court make the judicial determination.” CP 208. She alleges that “Mr. Foster knew where the Will was and never attempted to obtain possession.” CP 209. Nothing in the record indicates that Mr. Foster failed to heed Ms. Willey’s wishes because Ms. Willey did not have the original 1985 Will in her possession. Instead, he (and perhaps Ms. Willey as well, CP 155, 213) tried to reach a settlement with Ms. Salvati and avoid expensive litigation. CP 185-88, 193, 205, 250-52. The hiring of Mr. Foster and his decision, as her agent, to pursue settlement broke any chain of causation that might have linked Mr. Rekow to any damages Ms. Willey might have actually incurred.²¹

That these acts defeat proximate cause is established by analogous cases holding that when successor counsel misses a filing and thereby causes harm to the client (such as by allowing a statute of limitations to expire), the chain of causation is broken if the new attorney (1) knew of the missed filing; and (2) had time to take corrective action. *Lockhart v. Greive*, 66 Wn. App. 735, 741-43, 834 P.2d 64 (1992); *see also Barry v.*

²¹ There was (and is) a substantial likelihood that Mr. Willey’s revocation efforts and/or the divorce invalidated the 1985 Will. Litigating over the Will was an all or nothing proposition that could easily have gone against Ms. Willey. Delaying litigation while the parties pursued settlement thus was a reasonable strategy for both parties.

Ashley Anderson, P.C., 718 F. Supp. 1492, 1494 (D. Colo. 1989); *Frazier v. Effman*, 501 So. 2d 114, 116 (Fla. App. 1987); *Meiners v. Fortson & White*, 210 Ga. App. 612, 436 S.E.2d 780, 781 (1993); *Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill. App. 3d 618, 773 N.E.2d 1192, 1194-96 (2002). The undisputed evidence establishes that both of these factors are present here. By no later than November 6, 2008, Ms. Willey retained Mr. Foster “to file the will immediately[.]” CP 208. Under *Lockhart* and the other authorities cited above, that broke any causal connection that might somehow have existed.

D. The Trial Court Properly Dismissed Ms. Willey’s Negligence Claim

On appeal, Ms. Willey argues that her negligence claim is somehow distinguishable from her other, statute-based causes of action, and thus should not have been dismissed. For multiple reasons, the Court should reject that argument.

First, Ms. Willey did not make any such argument to the trial court. CP 305-27. Respondents sought dismissal of all claims, and Ms. Willey affirmatively represented that she was only “suing Mr. Rekow for a violation of RCW 11.20.010.” CP 322. Under RAP 9.12, review of a summary judgment ruling is limited to “only evidence and issues called to the attention of the trial court.” The trial court did not “overlook” Ms. Willey’s so-called independent negligence claim – issues pertaining to that

“claim” were never drawn to its attention and in fact were disavowed or abandoned.

Second, Ms. Willey never alleged a negligence cause of action independent of RCW 11.20.010. All of Ms. Willey’s causes of action – negligence, breach of fiduciary duty, malpractice, etc. – were premised solely on Mr. Rekow’s alleged violation of the duties imposed by RCW 11.20.010. CP 8-11. Ms. Willey represented to the trial court that she was “not suing Mr. Rekow for malpractice,” rather she was “suing [him] for a violation of RCW 11.20.010.” CP 322.

Third, the apparent premise of Ms. Willey’s new argument – that her negligence claim against Mr. Rekow is not dependent upon proof of the elements of an RCW 11.20.010 violation – is untenable. Not surprisingly, Ms. Willey cites no authority for the proposition that a party can negligently violate a statute which prohibits only willful conduct. RCW 11.20.010 imposed a duty on Mr. Rekow not to act willfully. Acting negligently would not breach that duty.

Fourth, even if Ms. Willey could articulate an independent negligence claim against Mr. Rekow (which she cannot), it would fail as a matter of law for lack of evidence of damages proximately caused by Mr. Rekow’s alleged breach. *See* Sec. IV.C, *supra*. It would also fail because Ms. Willey has made no showing that Mr. Rekow breached the duty of ordinary care. To the contrary, upon learning of a potential dispute

between Ms. Willey and Ms. Salvati (Mr. Willey's ex-wife and his daughter), Mr. Rekow provided both parties with all of the information in his possession – including information suggesting that the 1985 Will was no longer valid – so that they could decide how to proceed. CP 44-63. His disclosure efforts were entirely impartial. The duty of ordinary care requires nothing more.

In short, Ms. Willey's assertion of a negligence claim not only comes too late, it is without merit. There is no viable negligence claim for this Court to reinstate.

V. REQUEST FOR RAP 18.9(a) SANCTIONS

Ms. Willey failed to support her assertions with citations to the record, as is required by RAP 10.3(5) and (6). Her new definition of willfulness, and her arguments regarding her negligence claim, are asserted for the first time on appeal, in violation of RAP 9.12 and the invited error doctrine.

RAP 18.9(a) authorizes the Court to award sanctions, including attorney fees, when a party “fails to comply with” the Rules of Appellate Procedure. Ms. Willey's failure to provide evidentiary or legal support for her arguments, coupled with her significant violations of procedural rules, warrants a sanctions award. Respondents accordingly respectfully ask the Court to impose sanctions against Ms. Willey.

VI. CONCLUSION

Mr. Rekow had no duty to “file” Mr. Willey’s 1985 Will. He ensured that Ms. Willey, as well as Ms. Salvati, were fully informed as to the terms of the 1985 Will, its location, and Mr. Willey’s post-divorce intent. No evidence supports Ms. Willey’s claims against Respondents. For these and all of the additional the reasons stated herein, Respondents respectfully ask the Court to affirm the trial court’s summary judgment order and impose sanctions against Ms. Willey.

DATED this 29th day of July, 2013.

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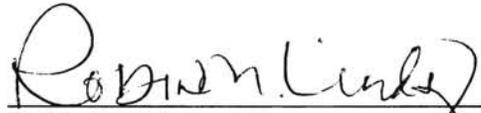
DECLARATION OF SERVICE

On July 29, 2013, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

John R. Marts	<input type="checkbox"/>	Via Messenger
Janet Susan Stark	<input checked="" type="checkbox"/>	Via U.S. Mail
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I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 29th day of July, 2013, at Seattle, Washington.


Robin M. Lindsey, LEGAL ASSISTANT